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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED STATES OF AMERICA, APPELLANT

v.

PARKE, DAVIS & COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JURISDICTIONAL STATEMENT

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OPINION BELOW

The opinion, findings, and conclusions of the district court (Appendix A, *infra,* pp. 22–38) are reported at 164 F. Supp. 827.

JURISDICTION

This suit was brought under Section 4 of the Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. 4. The judgment of the district court (Appendix B, *infra,* p. 39) was entered on July 16, 1958, and the notice of appeal was filed on September 11, 1958. The jurisdiction of this Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U. S. C. 29, as amended by Section 17

of the Act of June 25, 1948, 62 Stat. 989. *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485; *United States* v. *McKesson & Robbins*, 351 U. S. 305.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 3 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended (15 U. S. C. 1, 3, 4), commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * * Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in * * * the District of Columbia, or in restraint of trade or commerce * * * between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor * * *.
>
> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in

equity to prevent and restrain such violations. * * *

QUESTIONS PRESENTED

The Government's evidence in a Sherman Act civil suit charging a manufacturer with illegal resale price maintenance showed that, in areas which have no "fair trade" laws, the manufacturer had (1) refused to sell directly to retailers who failed to observe the manufacturer's minimum resale prices and/or advertised discount prices on such products, (2) induced and compelled, and obtained agreement from, its wholesale distributors to stop selling to such price-cutting and discount-advertising retailers, and (3) resumed selling to the retailers after they had ceased price cutting or discount advertising and, in some instances, had agreed with the manufacturer to stop advertising discount prices. The evidence further showed that the defendant had terminated these practices prior to trial, after the Government had instituted its Sherman Act investigation and in part as a result thereof. The following questions are presented:

1. Whether the district court erred in holding that these practices constituted merely unilateral action by the manufacturer in selecting its customers, which is permissible under *United States* v. *Colgate & Company*, 250 U. S. 300, and not a price-fixing conspiracy between the manufacturer and the retailers and wholesalers.

2. Whether the district court further erred in holding, as an alternative ground for dismissing the complaint, that no relief was necessary because there was

"no reasonable probability" that the defendant would resume its attempts to maintain resale prices.

STATEMENT

On May 2, 1957 the United States filed a civil suit under Section 4 of the Sherman Act charging that Parke, Davis & Co. ("PD") had violated Sections 1 and 3 of that Act by conspiring to fix wholesale and retail prices of pharmaceutical products which it manufactures.[1] The principal alleged terms of the conspiracy were (1) that certain retail drug stores in Washington agreed with PD (a) not to sell PD's products at less than the resale prices which it fixed and (b) not to advertise such products at discount prices; and (2) that five wholesale druggists (three in Washington and two in Virginia) agreed with PD not to sell PD products to retail druggists who sold or advertised such products at discount prices (Pars. 13–15). Both the retailers and the wholesalers were named as coconspirators, but not defendants.[2]

At the conclusion of the Government's evidence, the district court granted the defendant's motion to dis-

[1] The complaint also alleged (in a separate count, Pars. 18–22) that pursuant to a conspiracy with PD, another drug wholesaler had agreed to discontinue granting discounts or dividends to retailers on PD pharmaceutical products. Before trial, the Government dismissed this count with prejudice, because it concluded that the pertinent evidence thereunder "properly belonged under this first cause of action" (Tr. 249; see Tr. 248).

[2] Prior to the filing of the suit, PD and two of its officials had been indicted for the same violations of the Sherman Act. At the close of the Government's case, the court directed a verdict of acquittal. *United States* v. *Parke, Davis & Company*, D. D. C., Cr. 444–57.

miss and entered judgment of dismissal. The court held (Tr. 448) that the Government had "failed to prove the existence of the conspiracy as alleged in the Complaint." It ruled that there were no agreements between PD and its retailers and wholesalers, and that PD's actions "were properly unilateral and sanctioned by law under the doctrine laid down in the case of *United States* v. *Colgate & Company,* 250 U. S. 300" (*infra,* p. 24). The court further held, as an alternative ground for dismissal, that "even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed," and that there was "no reasonable probability or danger" that the practices would be resumed.

The facts[3]

PD manufactures and sells approximately 600 different pharmaceutical products (Fdgs. 1, 2). It distributes these products to drug wholesalers and retailers in the District of Columbia and Virginia through its Baltimore, Maryland branch office (Fdg. 1). Retailers may buy PD products either directly from it or through wholesalers; on many items, its own prices are "substantially" lower than the wholesalers' (Tr. 27, 91; Fdg. 5).

PD has unilaterally established minimum wholesale and retail resale prices (Fdg. 7). Its retail catalogue stated that the "Minimum Retail Prices" therein set

[3] The statement of the facts is based upon the testimony and documentary evidence introduced by the Government, and certain unchallenged findings of the district court. Except where otherwise indicated, we believe that this evidence is substantially uncontradicted.

forth were also "suggested" for use in states which had not enacted "Fair Trade" laws (Fdg. 8). During the period covered by the complaint, there was no "fair trade" law in effect in the District of Columbia or Virginia (Fdg. 6). PD's wholesale catalogue stated that it was the company's "policy" to sell to wholesalers who observed the "Net Price Selling Schedule" therein set forth (Fdg. 9). It was also the company's "accepted custom" "that the wholesalers will not sell to retailers to cut prices" (Tr. 361–362); the wholesalers, however, had never been aware of such "custom" (Tr. 210–211, 278, 294–295, 365).

In the Spring of 1956, the manager of PD's Baltimore branch office was aware that certain retailers in the District and Virginia were advertising and selling PD products below the "suggested" resale prices (Tr. 364; GX 15). However, at that time he did not know of any company policy not to sell to price-cutting retailers in non-"fair trade" areas (Tr. 362–364, 407). He first learned of such policy from the President of PD at a branch managers' meeting in June, 1956, at the company's main office in Detroit (Tr. 364–365). After that meeting, he instructed his field manager for Washington and Virginia "to contact these price-cutting retailers and tell them if they did not observe your [PD's] prices they would be cut off," and also "[i]nstructed him to go to the wholesalers and say 'We don't want you to sell to these price-cutting retailers'" (Tr. 366–367, 401–402).

The field manager carried out his instructions. Early in July, 1956, he (and/or other PD represent-

atives) visited the five retailers which had been advertising and selling PD products at cut rate prices,[4] and told them that unless they ceased doing so, they would be cut off, both on direct purchases from PD and on purchases through wholesalers (Tr. 29, 99–101, 129–130, 185–186, 192–193, 194, 315–G). For example, Haft, the operator of Dart Drugs, was told that, pursuant "to a new policy that Parke Davis was going to set up * * * if I did not raise my prices from the discount level to the minimum resale [prices], they would no longer ship me merchandise and that they would see that the wholesalers who they dealt with would not ship me merchandise; they would cut off the wholesalers from buying from Parke Davis" (Tr. 29). The PD representative also stated "that he had already that day contacted Drug Mart Stores" and "had told them the same thing; they would be cut off from their source of supply if they didn't bring their prices up—and they had indicated they would raise their prices" (Tr. 29–30); and that "they would go to Peoples Drugstores, to Tate's Drugstores, to Standard Drugstores, to Babbitt's stores, and anyone else that was applicable in this area" (Tr. 31).[5]

[4] The five price-cutting retailers were Dart Drug, Standard Drug, State Drugs, Babbitt's, and McReynolds Pharmacy (Tr. 369). There was some price-cutting by Peoples Drug Stores, but after a PD representative advised a vice-president of Peoples (Tr. 320) that it would be cut off if it continued to cut prices, Peoples stated it would "go along with" PD's "plan" (Tr. 346).

[5] In the summer of 1956 a PD representative told the coordinator of the Drug Mart, a group of 30 independent drug stores "who got together to advertise and buy cooperatively"

Despite these threats, the retailers continued to advertise and sell PD products at discount prices (Fdg. 13). PD then stopped selling directly to them (Tr. 32, 33, 102, 315-C, 324, 325, 369). PD also instructed or requested its wholesalers in Washington and Richmond not to sell PD products to them (Tr. 47–48, 49, 92–A, 104, 126, 145, 167–168, 196–197, 203, 204, 213, 279–280, 296, 298, 300, 315–D, 324), and informed the wholesalers "that they were visiting all wholesalers in this area on the same problem" (Tr. 147; 279–280). The wholesalers were aware that if they continued selling to the price-cutting retailers, they would, in turn, be cut off by PD (Tr. 154, 304, 397). One of the wholesalers "agreed to abide by their request" (Tr. 280). The wholesalers "cooperated" with PD (Tr. 315-D; 369), and refused to fill the retailers' orders for PD products (Tr. 43, 48, 103, 106, 122–123, 131–132, 216),[6] marking the orders as "Out" even though they were in stock (Tr. 50, 103, 123, 181–183, 285, 312–313).[7] As a result, with one brief exception,

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(Tr. 184, 106–108), that "Peoples was going to stop cutting prices, or had stopped cutting prices * * * and asked me whether we would go along. He also said at the time that, if we did not stop cutting the price, that P–D would find a way to cut our stores off from direct buying, or from buying the P–D products. I told him at the time that I would go along with him; that, as long as Peoples went along, I would go along" (Tr. 185–186; see, also, Tr. 108). Drug Mart discontinued its cut rate advertising (Tr. 186–187, 190, 108–109, 110–111, GX 7).

[6] Two of the wholesalers testified that, had it not been for PD's actions, they would not have cut off the retailers (Tr. 176–177, 219).

[7] Although the wholesalers instructed their personnel not to fill PD orders for the retailers (Tr. 147–148, 150, 180–181, 214,

the five retailers were cut off on PD products for approximately seven weeks in July and August, 1956 (Tr. 51, 124, 133, 327, 373).[8]

On August 28, 1958, the manager and assistant manager of PD's Baltimore office visited three of the retailers in Washington who had been cut off—Dart, State and McReynolds (Tr. 327, 332, 333, 373–374, 378–380). They asked Haft of Dart "if I had had enough, if I was willing to agree to their terms * * * they said if I would discontinue advertising, as per the former agreement, take the signs out of the window * * * that they would resume shipment * * * (Tr. 53).[9] Haft "discontinued advertising, took the signs off the window, and took the cards out of the window * * * (Tr. 54), and he was then "able to obtain Parke Davis products direct from the company"

281, 300, 311–312), a few orders might have "slipped through" (Tr. 281–282, 307, 373) or have been filled by "mistake" (Tr. 154; see also, Tr. 87–89, 125–126). In addition, one of the wholesalers in Richmond, Virginia, apparently did fill orders for one of the retailers (Tr. 204).

[8] A couple of weeks after Dart Drugs had been cut off on July 3, 1956 (Tr. 51), PD's Baltimore office told Haft that if he "would stop advertising" cut rate prices, PD would resume selling to him, and that if he stopped, "everyone else would" (Tr. 318, 331, 36-37). Haft "agreed to stop the advertising" (Tr. 36). From July 19 to July 27, 1956, Dart Drugs again received some shipments from PD (Tr. 51, 37, 318). However, it was again cut off a couple of weeks later when, following a complaint by Haft that other stores were again advertising discounts, Dart Drugs also resumed such advertising (Tr. 38–39, 318–319).

[9] The PD officials testified that the suggestion to discontinue advertising was not made by them, but by Haft (Tr. 330, 332–333, 375).

and also from the wholesalers (Tr. 55).[10] The PD officials also stated "that they had gotten Standard Drug, Babbitt, Tates, Peoples and all the rest of the retailers back in line * * * in reference to advertising and window displays on Parke Davis items" (Tr. 54–55), and that "everyone else would stop advertising" (Tr. 73). Haft gave the PD officials "his word on the 28th of August that he would not advertise cut prices" (Tr. 378, 53; GX 20).[11]

The PD officials asked the operator of State "if I would be willing to take my prices down and of course sell it on the inside [at cut prices] if the other so-called discount stores ceased advertising in the paper, and I informed him that I would be very happy to; I would agree to that" (Tr. 133). Approximately a week later the PD officials returned and indicated "that everything was O.K. and that I accepted, and of course I assumed that meant that I could take my signs down and sell the vitamins at reduced prices on

[10] On December 12, 1957, after Haft had testified in the criminal case which resulted in acquittal (see *supra*, note 2), PD advised him by letter (GX 5) that it would no longer sell directly to him (Tr. 66–68). Since that date, Haft has been obtaining PD products only from wholesalers—but at "substantially higher" prices than on direct sales from PD (Tr. 91).

[11] The reason that PD was so anxious to stop the cut-rate advertising is explained in the testimony of Powers, the assistant manager of the Baltimore branch office. He stated that PD "never had any problem" with price cutting in the area until the "widespread newspaper advertising" began (Tr. 315–H); that if they could control the advertising "it would take the bang out of it, or the so-called impetus that advertising was causing" (*ibid.*), and would give PD "some measure of control over the price situation" (Tr. 315–K); and that the advertising was "demoralizing" (Tr. 315–J). See *infra*, p. 17.

the inside, which I proceeded to do" (Tr. 134–135). Similarly, the PD officials told a McReynolds partner that "If you fellows would be willing to go along to the extent, since you do not advertise in the newspaper, if you would just take your signs down, we could again do buying and business together" (Tr. 115). After McReynolds "agreed temporarily that we might take these signs down" (*ibid.*) and "stop[ped] all of our signs which was the only extent of our advertising," it was "then able to buy direct from Parke, Davis again" (Tr. 116).[12]

On August 28, 1956, or shortly thereafter, the Baltimore manager advised all the wholesalers that "they could again sell to these retailers" (Tr. 380–381; see Tr. 55, 153, 170, 218, 302–303, 336). Except for one ad, for several weeks thereafter there was no cut rate advertising in the Washington newspapers by the retail drug stores which previously had been cut off (Tr. 381), or by Peoples (Tr. 111, 113) or Drug Mart (Tr. 185–186, 326–327) (see notes 4, 5, *supra*). Such advertising was not resumed in the District until November, 1956 (Tr. 56, 381–382).

[12] One of the PD officials testified that, after telling the State operator that Haft had suggested stopping advertising, he asked him "would they want to go along on such a policy as that or such a plan," and the State man indicated that "it was acceptable" to him (Tr. 332–333). Similarly, he testified that the McReynolds representative stated that "if Dart would not advertise, we are interested in doing business with you and we will take our signs out of the windows" (Tr. 334). See also Tr. 378–380 for further testimony that the PD officials told State and McReynolds that Dart had agreed to stop advertising.

The decision of the district court

In holding that the Government had "failed to prove the existence of the conspiracy as alleged in the Complaint" (Tr. 448), the district court stated (*infra*, pp. 23–24) that PD had "well-established policies concerning the prices at which defendant's products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell"; that PD's representative "notified retailers concerning the policy under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy"; that the representatives "likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant"; that "every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others"; and that "both wholesalers and retailers valued defendant's business so highly that they acceded to its policy." The court concluded (*infra*, p. 24), that "there was no coercion by defendant or no agreement with co-conspirators," and that PD's "actions * * * were properly unilateral and sanctioned by law under the doctrine laid down in the case of *U. S.* v. *Colgate & Company*, 250 U. S. 300." [13]

[13] In its findings, the court found (Fdgs. 21-23) that PD did not solicit any agreement with Drug Mart, Standard Drug or Dart Drug with respect to prices or advertising, and that neither Drug Mart nor Standard entered into any such agreement with PD.

The court further ruled that in the fall of 1956 PD "abandoned in good faith its efforts to maintain resale prices in the involved territory, and, in the Court's opinion, there is no reasonable probability or danger that defendant or any other pharmaceutical company will unilaterally, or with others, strive to fix or to enforce any conditions with respect to the sale of its or their products" in the District or in Virginia. The court stated (*infra*, p. 25) although PD's assistant general attorney had testified that its abandonment of attempts to enforce fair trade prices in the District was "in some measure" the result of PD's having learned of the Department of Justice investigation of the matter, that it was "evident to the Court that the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field." The court found (Fdg. 27) that "[t]here is no proof or indication of any intention on the part of Parke, Davis to resume" its "efforts" to "compel the cessation" of retail price cutting in the District and Virginia. The court concluded (*infra*, p. 25) that "even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and it follows that to enjoin defendant from doing as alleged where there is nothing to enjoin, and no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated, would be an empty gesture."

THE QUESTIONS ARE SUBSTANTIAL

1. The holding of the district court that PD's action to eliminate price competition in non-"fair trade" areas amounted to no more than a "unilateral" selec-

tion of customers which is permissible under *United States* v. *Colgate & Co.*, 250 U. S. 300, ignores the distinction which this Court has drawn "between the permissible selection of customers under the decision in *Colgate & Co.* and unlawful arrangements as to prices * * *." *United States* v. *Bausch & Lomb Co.*, 321 U. S. 707, 729. While *Colgate* indicates that "a simple refusal to sell to customers who will not resell at prices fixed by the seller is permissible under the Sherman Act" (*id.*, at 721; *Federal Trade Commission* v. *Beech-Nut Packing Co.*, 257 U. S. 441, 454), the seller "may not, consistently with the Act, go beyond the exercise of this right, and by contracts or combinations, express or implied, unduly hinder or obstruct the free and natural flow of commerce in the channels of interstate trade" (*Beech-Nut* case, *supra*, p. 453; *Bausch & Lomb* case, *supra*, p. 722). And, as this Court indicated less than a year after the *Colgate* decision, an illegal agreement "between the seller and purchaser to maintain resale prices" (*Bausch & Lomb*, *supra*, p. 721) may be "expressed or implied from a course of dealing or other circumstances." *United States* v. *A. Schrader's Son, Inc.*, 252 U. S. 85, 99.

We submit that these principles compel the conclusion that the Government's evidence showed far more than "a simple refusal to sell to customers who will not resell at prices fixed by the seller" (*Bausch & Lomb*, p. 721). As set forth in the statement (*supra*, pp. 6–11), the record shows that, several weeks after PD had cut off its retailers for cut rate selling and advertising, and induced its wholesalers to boy-

cott them, it approached the retailers, stated that it would resume selling to them if they "went along" with the suggestion that they stop discount advertising,[14] and informed them that the others were going along with the proposal. The retailers' subsequent cessation of such advertising, and PD's resumption of direct selling to them, clearly shows a tacit understanding by the retailers with PD that, in return for getting PD products again, they would stop discount advertising. Indeed, two of the retailers testified that they "agreed" with PD to do so. Tr. 36, 53, 120. Furthermore, the actions of the wholesalers, taken with knowledge that the others also were doing it, in boycotting the retailers at PD's insistence, then resuming sales to them when PD gave the green light, similarly shows an implicit agreement between the wholesalers and PD not to sell to the retailers as long as PD did not wish it.

In short, PD did not "merely indicate * * * [its] wishes concerning prices and dealing * * * further dealings with all who fail to observe them" (*A. Schrader's Son, Inc., supra*, p. 99). On the contrary, the effect of the implementation of PD's policy of enforcing its "fair trade" prices in non-"fair trade" areas was that price "competition among retail distributors is practically suppressed; for all who would

[14] As indicated (*supra*, p. 81), there is a conflict in the testimony as to whether the suggestion that the retailers stop such advertising emanated from them or from PD. But the source of the suggestion is immaterial; the crucial fact is that the suggestion was accepted, the retailers stopped advertising, and PD then resumed selling to them and authorized the wholesalers also to do so.

deal in the company's products are constrained to sell at the suggested prices. * * * [W]holesale dealers who would supply the trade may not get the goods of the company, if they sell to those who do not observe the prices indicated * * *" (*Beech-Nut* case, *supra*, p. 455). The evidence thus shows "suppression of the freedom of competition by methods in which the company secures the cooperation of its distributors and customers * * *. By these methods the company, although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition by preventing all who do not sell at resale prices fixed by it * * *." *Ibid.* "As in the *Beech-Nut* case, there is more here than mere acquiescence of wholesalers [and retailers] in [PD's] * * * published resale price list." *Bausch & Lomb*, *supra*, p. 723.

The effect of the decision below is to permit a manufacturer, by cutting off all sales to retail price cutters (directly and through wholesalers) as long as they sell below its suggested resale prices, to enforce "fair trade" in non-"fair trade" areas. But "[a] distributor of a trade-marked article may not lawfully limit by agreement, express or implied, the price at which or the persons to whom its purchaser may resell, except as the seller moves along the route which is marked by the Miller-Tydings [and McGuire] Act[s]." *Bausch & Lomb*, *supra*, p. 721. A system such as PD's is particularly effective in eliminating price competition in the drug field where retailers, in order to retain customers, may be compelled to stock the products of a particular manufacturer.

Price competition also is suppressed by eliminating discount advertising. See note 11, *supra*. "Modern competition for business finds advertising one of the most usual and useful of weapons." *Franklin National Bank* v. *New York*, 347 U. S. 373, 377. In view of the increasingly large numbers of states, the "fair trade" statutes of which have been invalidated,[15] these systems could become a widespread method for enforcing illegal resale price maintenance. The legality of such a system under the Sherman Act plainly presents a substantial question.[16]

2. The court below also erred, we believe, in holding, as an alternative ground for dismissing the complaint, that there is "no reasonable probability" that PD would resume its attempts to fix retail prices. While a court of equity has "broad" discretion to determine whether "relief is needed," there must be a "reasonable basis for the District Judge's decision" that relief is unnecessary. *United States* v. *W. T. Grant Co.*, 345 U. S. 629, 633, 634. We submit that there is "no reasonable basis" (*Grant* case, *supra*, p. 634) for the district court's ruling that there is no need for injunctive relief in this case.

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[15] As of June 26, 1958, 16 of the 45 state non-signer "fair trade" laws had been held unconstitutional, and one had been held unenforceable. Three states had no "fair trade" laws. CCH Trade Reg. Rep. ¶¶ 3003, 3085.

[16] If probable jurisdiction is noted, we reserve the right to argue that PD's arrangements with its wholesalers under which the latter sell at the resale prices fixed by PD are illegal on an additional ground: that since PD and its wholesalers compete in selling to retailers (Tr. 163, 174, 177, 211, 317, 366), they cannot "fix resale prices". Cf. *United States* v. *McKesson & Robbins*, 351 U. S. 305, 313.

Unlike *Grant*, where the defendants "disclaimed any intention to revive" the challenged interlocking directorates which had been terminated (p. 633), there is here no affirmative disclaimer by PD of intention to resume its attempts at resale price maintenance. Similarly, there is nothing in the record to support the district court's conclusions that "in the fall of 1956, [PD] abandoned in good faith its efforts to maintain minimum resale prices in the involved territory"; that "the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field"; and that, "under the long-continuing competitive conditions, neither defendant nor other manufacturer or distributor of like goods could possibly attempt to do so" other than with "heavy financial loss" (*infra*, pp. 24–25). The only evidence in the record showing the reasons for abandonment (whether in "good faith" or not, whatever that may mean) of PD's attempts to enforce "fair trade" prices is the testimony of PD's assistant general attorney that "one of the reasons" therefor was the Government's antitrust investigation (Tr. 229, 232). "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit * * *." *United States* v. *Oregon State Medical Society*, 343 U. S. 326, 333. The only evidence in the record relating to "business and economic conditions in its field" is the testimony that since the year 1955 Parke Davis' "sales volume has gone up generally" (Tr. 403). The statement by a PD official that the price situation in the District had "blown up again" in

November 1956 when cut price advertising was resumed (GX 21; Tr. 384), and the fact that thereafter the retailers were able to obtain PD products despite their cut rate advertising and selling (Tr. 66–67, 116–117, 138, 206–207), do not support the court's rulings on this issue.

Although the district court found that "[t]here is no proof or indication of any intention on the part of Parke, Davis to resume" its "efforts" to "compel the cessation" of retail price cutting in the District and Virginia (Fdg. 27), the Government was not required to introduce such proof. On the contrary, it is for "the defendant" to "demonstrate that 'there is no reasonable expectation that the wrong will be repeated,' " and that "burden is a heavy one." *Grant* case, *supra*, p. 633. We submit that the defendant has completely failed to sustain its burden of making such a showing.

Since the *Grant* decision, there appears to be an increasing trend by defendants in Government civil antitrust cases of abandoning the challenged practices either shortly before or at the time of suit and then urging that, because of such abandonment and the unlikelihood of resumption, injunctive relief is unnecessary.[17] While the argument has been accepted in a number of cases, in all of them there was strong

[17] For example, see *United States* v. *Chicago Mortgage Bankers Assn.*, 123 F. Supp. 251 (N. D. Ill); *United States* v. *L. D. Caulk Co.*, 114 F. Supp. 939 (D. Del.); *United States* v. *The Cincinnati Fruit and Produce Credit Assn.*, Civil No. 2426 (S. D. Ohio) January 18, 1956; *United States* v. *Morgan Construction Co.*, Civil No. 52–914–M (D. Mass.), June 10, 1955, in addition to the cases listed in note 18, *infra*.

evidence showing no need for relief.[18] Here, however, we submit that there is no basis in the record for the district court's holding that there is "no reasonable probability" that PD would resume its attempts to maintain "fair trade" prices in non-"fair trade" areas, and that the court accordingly abused its discretion in so holding.

The question whether an antitrust defendant may avoid issuance of an injunction, designed to protect the public from repetition of illegal anticompetitive practices, by the simple expedient of stopping such practices upon learning of the Government's investigation, without even undertaking not to resume them and without introducing any evidence bearing on that issue, plainly presents a substantial question in the enforcement of the antitrust laws.

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[18] Thus, in *United States* v. *National City Lines*, 134 F. Supp. 350, 361 (N. D. Ill.), all the defendants had "introduced evidence that they have no intention" of repeating the violation, and the Government "offered" "[n]o evidence" "to rebut or to contradict this testimony." In *United States* v. *Insurance Board of Cleveland*, 144 F. Supp. 684, 690–691 (N. D. Ohio), the reorganization of the Board resulted in the elimination of three of its rules which the Government had challenged as unreasonable restraints of trade, the Board stated that it had no intention "to reenact or enforce" the three rules, and the Board's former president gave sworn testimony to that effect. In *United States* v. *Logan Co.*, 147 F. Supp. 330, 334 (W. D. Pa.), the price-fixing conspiracy related to a patented article. Since the patent had expired, and it "affirmatively appears that the alleged illegal license agreements could survive no longer than the patent, there remains no subject matter upon which the conspiracy charged against defendants could operate."

CONCLUSION

The questions presented by this appeal are substantial and of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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DECEMBER 1958.

APPENDIX A

United States District Court for the District of Columbia

Civil Action No. 1064–57

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARKE, DAVIS & COMPANY, DEFENDANT

(Filed July 16, 1958, Harry M. Hull, Clerk)

OPINION

This is a proceeding instituted by the United States under Section 4 of the Act of Congress of July 2, 1890, C. 647, 26 Stat. 209, as amended, and entitled "An Act to protect trade and commerce against unlawful restraint and monopolies", commonly known as the Sherman Act. It was brought in order to prevent alleged violations by the defendant, Parke, Davis & Company, of Sections 1 and 3 of the Act (15 U. S. C., Sections 1 and 3).

In the Complaint it is stated that the defendant, one of the nation's principal manufacturers and distributors of pharmaceutical products, engaged, with various co-conspirators, distributors of defendant's products, in an unlawful combination and conspiracy to establish, maintain, enhance and fix both wholesale and retail prices on defendant's products in interstate commerce throughout the District of Columbia and the State of Virginia in violation of the hereinabovenamed sections of the Act. The alleged co-conspirators were not named as defendants.

Plaintiff prayed that defendant be decreed to have combined and conspired as alleged; that it and all

claiming to act in its behalf be perpetually enjoined from carrying out the alleged conspiracy in all respects; and that defendant be enjoined from boycotting, or attempting to boycott, any person, firm or corporation selling or advertising for sale defendant's products below its suggested resale price. Issue was duly joined by Answer of defendant.

At the conclusion of plaintiff's case, counsel for defendant moved under Rule 41 (b) of the Federal Rules of Civil Procedure to dismiss the Complaint; the Court having considered the briefs of the parties, reviewed the transcript, heard oral arguments, and having concluded, upon the facts and the law, that the plaintiff had shown no right to relief, granted the motion, and judgment was ordered accordingly.

It is apparent to the Court, from the testimony and exhibits, that defendant had well-established policies concerning the prices at which defendant's products were to be sold by wholesalers and retailers, and the type of retailers to whom the wholesalers could re-sell. It appears that defendant sold its products in the above-mentioned territory directly to retailers through its Baltimore branch in quantity lots at prices less than the retailers could buy from the wholesalers—the latter sold to the retailers primarily in smaller quantities.

It further appears that the sale of defendant's products as compared with the overall sales of like or similar products of other pharmaceutical concerns is very small, but that there is keen competition between its products and those of other producers. Fair Trade laws were not in effect either in the State of Virginia or in the District of Columbia during the pertinent period.

The entire record reveals that representatives of defendant notified retailers concerning the policy

under which its goods must be sold, but the retailers were free either to do without such goods or sell them in accordance with defendant's policy. Defendant's representatives likewise contacted wholesalers, notifying them of its policy and the wholesalers were likewise free to refuse to comply and thus risk being cut off by the defendant. It may be noted that every visit made by the representatives to the retailers and wholesalers was, to each of them, separate and apart from all others.

The evidence is clear that both wholesalers and retailers valued defendant's business so highly that they acceded to its policy.

It is apparent from what has been said herein that there was no coercion by defendant and no agreement with co-conspirators as alleged in the Complaint. Clearly, the actions of defendant were properly unilateral and sanctioned by law under the doctrine laid down in the case of *U. S. v. Colgate & Company*, 250 U. S. 300. That doctrine continues to be the law.

Counsel for the plaintiff contends vigorously that proof of its allegations is implicit in (1) defendant's calling the attention of both retailers and wholesalers to its policy, and (2) the distributors' acquiescence to the policy. The Court cannot agree to such a nebulous deduction from the record before it.

It was shown that defendant, in the fall of 1956, abandoned in good faith its efforts to maintain minimum resale prices in the involved territory, and, in the Court's opinion, there is no reasonable probability or danger that defendant or any other pharmaceutical company will unilaterally, or with others, strive to fix or to enforce any conditions with respect to the sale of its or their products in the State of Virginia or the District of Columbia. It is clear that, under the long-continuing competitive conditions, neither de-

fendant nor other manufacturer or distributor of like goods could possibly attempt to do so. If they did, there could be no result other than heavy financial loss.

It is true that the General Counsel of defendant testified that the abandonment of the required sales prices was in some measure concerned with defendant's having learned that the Anti-Trust Division of the Department of Justice was looking into its business, but he stated positively, in effect, that it was not the chief or moving factor in its action of abandonment. It is evident to the Court that the compelling reason for defendant's so doing was forced upon it by business and economic conditions in its field.

There can be no doubt from what has been stated herein that, even if the unlawful conditions alleged in the Complaint had actually been proved, since 1956 they no longer existed, and it follows that to enjoin defendant from doing as alleged when there is nothing to enjoin, and no reason to believe, or even surmise, the unlawful acts alleged can possibly be repeated, would be an empty gesture. *U. S.* v. *Hamburg-Amerikanische Co.*, 239 U. S. 466 (1916).

In view of the Court's opinion as hereinbefore set forth, there follows its Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The defendant, Parke, Davis & Company (hereinafter referred to as Parke, Davis) is a corporation organized and existing under the laws of the State of Michigan, with its principal place of business at Detroit, Michigan. It transacts business and is found within the District of Columbia. It maintains a branch office at Baltimore, Maryland, to which pharmaceutical products are sent in interstate commerce

from its principal plant in Michigan. These products are then distributed in interstate commerce from its Baltimore office to various drug wholesalers and retailers, including drug wholesalers and retailers in the District of Columbia and the State of Virginia. The Baltimore branch office operates in accordance with policies laid down by the Company's home office in Detroit.

2. Parke, Davis manufactures approximately 600 different pharmaceutical products, including both prescription and nonprescription items. In 1956, the total dollar volume of its sales in the District of Columbia and Richmond, Virginia, was as follows:

	To Retailers	*To Wholesalers*
District of Columbia	$199,304	$161,247
Richmond, Virginia	58,870	113,651

3. Parke, Davis' sales constitute less than 5% of the sales of pharmaceutical products in the District of Columbia and Richmond, Virginia. There are about 2,000 different drug manufacturers selling about 178,000 different drug items in the District of Columbia.

4. Plaintiff makes no claim that the prices for Parke, Davis products are not competitive with similar products produced by other pharmaceutical manufacturers. Parke, Davis' products are sold in the District of Columbia and the State of Virginia in intense competition with the products of other manufacturers.

5. Retailers may buy Parke, Davis products either directly from Parke, Davis or from wholesalers. Ordinarily, their large volume purchases are made from Parke, Davis which offers a lower quantity price on some of its products than the wholesalers offer. The wholesalers, on the other hand, provide the retailers the convenience of smaller quantity purchases, day-to-

day service, and a wide variety of products of many different manufacturers.

6. During the period covered by the Complaint, there were no Fair Trade laws in effect in either the District of Columbia or the State of Virginia.

7. Suggested minimum resale prices were unilaterally established by Parke, Davis for retailers and wholesalers in the District of Columbia and Virginia and elsewhere, and were published to the trade long before the summer of 1956.

8. The Parke, Davis catalogue for retailers contained the following statement under the heading "Minimum Retail Pricing Applying to Parke, Davis Products"

> "The Minimum Retail Prices herein set forth or in the Price Change Supplements applying thereto are in conformity with the provisions of the Fair Trade Laws of the States having such laws and are suggested for use also in those States which have not enacted Fair Trade Laws."

9. The Parke, Davis catalogue for wholesalers contained the following statement under the heading "Wholesale Drug Trade Sales and Distribution Policy"

> "It is the continuing policy of Parke, Davis & Company in dealing with wholesalers to sell its products to wholesalers who observe the Net Price Selling Schedule in this Parke, Davis & Company Wholesale Drug Trade Biller's Price List and Supplements, and who confine their distribution of Parke, Davis products, whether Rx legend or non-Rx legend, to customers authorized by law to fill or dispense prescriptions."

10. Parke, Davis did not have any regularized or systematic machinery for maintaining its suggested

minimum prices as to either retailers or wholesalers. It did not regularly "shop" stores, maintain card index files, or in any other manner police its suggested minimum prices in either the District of Columbia or Virginia, nor is there any evidence that it sought or obtained the cooperation of retailers or wholesalers in reporting or policing deviations from its suggested minimum prices.

Parke, Davis learned of the price cutting through its salesmen who called at those retail stores which ordered directly from Parke, Davis; the salesmen reporting the cut prices and advertising thereof, due to the complaints of such retailers.

11. In the spring of 1956, Parke, Davis also had a policy of refusing to sell to retailers it deemed to be undesirable customers, including those whose failure to maintain suggested minimum retail prices disrupted the market, and of refusing to sell to wholesalers who sold to retailers who were considered undesirable.

12. For a short time prior to the summer of 1956, there had been minor price cutting by certain retailers in the District of Columbia. Parke, Davis and its wholesalers continued to sell these retailers until the deep price cutting by retailer Dart Drug Company demoralized the market and caused the Baltimore branch manager to inquire as to a possible remedy at a Branch Managers' meeting at Detroit. This manager, prior to coming to the Baltimore office, had been in a branch which operated only in states having effective Fair Trade laws. At that meeting, he learned for the first time that the Company took the position, upon the advice of counsel, that in a non-Fair Trade area it could unilaterally refuse to sell to retailers who refused to observe the recommended resale prices of the Company. Upon the

basis of this information, the manager of the Baltimore branch office stated that he would apply this policy in the District of Columbia, and upon his return he instructed his assistants and the Company's salesmen to inform the trade in the District of Columbia and Virginia that it was the policy of Parke, Davis not to sell to any retailer who sold Parke, Davis products below suggested minimum prices, and not to sell to any wholesaler who, in turn, sold those products to such a retailer. Parke, Davis did not seek to enter into agreements with anyone, did not instruct its representatives to seek agreements nor authorize them to do so, but merely gave them authority to state the policy and its consequences. These instructions were carried out in July, 1956.

13. When five retailers continued, despite the announcement of Parke, Davis' intentions, to sell Parke, Davis products below the suggested minimum retail prices, Parke, Davis discontinued selling to them and told wholesalers in the District of Columbia and Virginia that it would discontinue selling to them also if they sold Parke, Davis products to those retailers.

14. Parke, Davis brought to the attention of each of the five wholesalers named as co-conspirators in the Complaint the names of several of the retailers who were selling its products at prices below the recommended retail prices. Three of the wholesalers attempted to stop their sales of Parke, Davis products to those retailers in order not to be cut off themselves, although occasionally such products were sold by inadvertence to those retailers. There is no evidence that Parke, Davis solicited any agreement, nor that any of the wholesalers made any agreement with Parke, Davis on this subject.

15. The retailers who were cut off by Parke, Davis because they failed to observe Parke, Davis' suggested

minimum retail prices continued nonetheless to advertise such products at cut prices by window displays or newspaper advertisements for the reason that they still had such products in their inventory.

16. Advertising of price cuts by a few retailers in the District of Columbia was, so far as Parke, Davis products were concerned, confined to a few products, mostly certain popular vitamins. In some cases, the prices quoted in the advertisements were below the price at which a small retailer could purchase the same product from Parke, Davis or one of its wholesalers. These advertisements injured the good name and marketability of Parke, Davis' products generally and resulted in Parke, Davis losing the support and confidence of the great majority of the retailers upon whom it relied for the promotion of its goods. The principal cut-price advertiser, Dart Drug, encouraged customers responding to its advertisements to purchase its own private brand of vitamins, and the proprietor of that concern acknowledged that on occasion its salesmen had switched customers requesting Parke, Davis products to such Dart private brands. This was one of the purposes of cut-price advertising.

17. In the latter part of August 1956, Parke, Davis' representatives separately advised some of the retailers it had cut off, of a change in the policy regarding retail prices, and stated that Parke, Davis would sell its products to them regardless of the prices at which they resold those products, but that Parke, Davis would not sell to them if they advertised price cuts on Parke, Davis' products in the newspapers or on their windows. Parke, Davis then resumed selling its products to each of these retailers, and although these retailers continued to sell Parke, Davis products at cut prices, for a period of one month, there were no

newspaper advertisements in the District of Columbia offering Parke, Davis products at cut prices. Parke, Davis neither solicited nor obtained any agreement regarding advertising from any of these retailers.

18. Although advertisements featuring Parke, Davis products at cut prices commenced to appear again in newspapers in the District of Columbia at the end of September 1956, and although the retailers which had ceased such advertising thereafter resumed it, Parke, Davis took no further action with regard to retail prices or advertising, and it continued to sell to all retailers concerned.

19. No witness was called connected with Peoples. The evidence shows that a representative of Parke, Davis advised a representative of Peoples that Parke, Davis would not sell to that company if it did not observe Parke, Davis' suggested prices. The Peoples' representative stated that Peoples would stop cutting prices on Parke, Davis' products and Parke, Davis continued to sell to Peoples. Parke, Davis did not solicit any agreement, and Peoples did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising.

20. No witness was called connected with Babbitt. There is no evidence that Parke, Davis solicited any agreement, or that Babbitt entered into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. However, sales to Babbitt were curtailed for a period of time and later resumed.

21. Standard Drug was advised of Parke, Davis' policy and informed that if it continued to cut prices on Parke, Davis products it would be cut off. It made no commitment of any kind to Parke, Davis, it continued to cut prices, and it was cut off for about two weeks. Parke, Davis did not solicit any agree-

ment, and Standard Drug did not enter into any agreement or understanding of any kind with Parke, Davis concerning either prices or advertising.

22. Drug Mart, a group of some 30 independent retail pharmacies in the District of Columbia, engaged in cooperative advertising and purchasing. From time to time, Drug Mart advertised cut prices on Parke, Davis products. Parke, Davis advised Drug Mart that Parke, Davis would refuse to sell the stores if cut-price advertising of Parke, Davis products continued, and Drug Mart in fact discontinued such advertising for a period of several months. There is evidence that one reason for Drug Mart's discontinuing this advertising was that Parke, Davis advised the organization that it was treating as a discount item certain resale premiums which, under Parke, Davis' sales policies were required to be paid to sales personnel in the various stores, and the buyer for Drug Mart felt he was not interested in promoting Parke, Davis' goods if he could not treat these payments as a discount. Parke, Davis did not solicit any agreement, and Drug Mart did not enter into any agreement or understanding of any kind with Parke, Davis concerning prices or advertising. The evidence shows that each member store of the organization was free to charge whatever prices it wished and to advertise as it wished, regardless of whether there was any joint advertising of Parke, Davis products.

23. Dart Drug was cut off early in July when it continued to sell at cut prices after being advised of the Parke, Davis policy. Sometime later in July, and again in the latter part of August, Parke, Davis' representatives advised Dart Drug that, if that concern advertised Parke, Davis products at cut prices, Parke, Davis would not sell to it, but that if it did not advertise such cut prices, Parke, Davis would sell

to it. Dart Drug ceased advertising Parke, Davis' products for a period of two weeks in July, and during this time purchased from Parke, Davis. When it again advertised Parke, Davis refused to sell. Parke, Davis again commenced selling to Dart Drug in August when Dart Drug ceased advertising and continued to do so after Dart resumed advertising two months thereafter. At all times, Dart Drug sold Parke, Davis' products at cut prices in its store, whether or not it was advertising them. Parke, Davis did not at any time solicit an agreement from, or make an agreement with, Dart Drug as to prices or advertising, but rather informed Dart of its policies and acted upon them.

24. State Drug and McReynolds Drug were among the retailers who were cut off by Parke, Davis when they continued to sell Parke, Davis products at cut prices after Parke, Davis' policy had been announced to them. Neither concern individually advertised cut prices in the newspapers, though they did through Drug Mart, an association of independent retailers. While neither one was alleged to have conspired individually with Parke, Davis as to pricing, advertising or any other matter, the Drug Mart group, of which State and McReynolds were members, was alleged to have conspired with Parke, Davis as to pricing and advertising.

25. No evidence was introduced to show that the discontinuance of advertising by a few retailers for a short period of time had any effect whatsoever on the prices charged to the public for Parke, Davis & Company products.

26. On December 12, 1957, subsequent to the trial of the companion criminal action, Parke, Davis informed Dart Drug Company that it was permanently closing the Dart account and did not intend to have

any further dealings with that company. Since that time, Parke, Davis has not sold its products to Dart Drug. There is no evidence, however, that Parke, Davis made any effort to influence the dealings of Dart Drug with the wholesalers, and Dart Drug has continued to purchase Parke, Davis' products from wholesalers in the District of Columbia and to sell and advertise such products at cut prices. Parke, Davis' action in ceasing relations with Dart was a purely unilateral one, and there is no evidence that it had any relation to Dart's prices or advertising policies.

27. In the fall of 1956, Parke, Davis in good faith abandoned and discontinued its efforts to maintain minimum resale prices in the District of Columbia and Virginia through refusals to sell. Since the fall of 1956, and up until the present time, retailers in both areas, including retailers alleged to be co-conspirators, have continuously sold and advertised Parke, Davis products at cut prices, and have been able to obtain those products from both the wholesalers and/or Parke, Davis itself. Parke, Davis has made no efforts to compel the cessation of these practices. There is no proof or indication of any intention on the part of Parke, Davis to resume such efforts. There is no present threat or substantial probability or likelihood that Parke, Davis will attempt, in the District of Columbia or Virginia, to cut off retailers who fail to sell its products at its suggested minimum resale prices, or to cut off wholesalers because they in turn sell to such retailers. Nor is there any threat or substantial probability or likelihood that Parke, Davis will contract, combine or conspire with others to fix or maintain prices or terms or conditions of sale for its products in the District of Columbia and Virginia.

28. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to fix the prices at which the wholesalers could resell the products of Parke, Davis. The evidence shows that the wholesalers were familiar with Parke, Davis' policies as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 observed Parke, Davis' suggested minimum resale prices because they each recognized that if they did not adhere to these prices Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis. There is no evidence that any of them made any agreement with Parke, Davis as to prices or that Parke, Davis ever solicited an agreement from any of them as to this matter.

29. The evidence shows that in early 1956 Washington Wholesale Drug Exchange, a co-operative, adjusted its practices in billing its customers on Parke, Davis goods so as not to credit any of its accounts with a cash discount on the face of the invoice, when Parke, Davis pointed out that it was crediting for a cash discount without proof that cash had in fact been paid. Its billing practices were inconsistent with the suggested minimum resale price policy of Parke, Davis, which took no action to prevent the granting of cash discounts whenever they had in fact been earned. Under the modified billing procedures, cash discounts were still granted in a different form. The evidence shows that in making this change in its billing practices, Washington Wholesale was merely conforming to Parke, Davis' minimum resale price policy, and did not make any agreement as to price.

30. The Complaint also charges that Parke, Davis combined and conspired with five wholesalers to sell pharmaceutical products only to retailers licensed to fill or dispense prescriptions. The evidence shows that

the wholesalers were familiar with Parke, Davis' policy in this respect as stated in Parke, Davis' wholesaler catalogue and had for many years prior to June 1956 refused to sell Parke, Davis' products to non-drug outlets because they each separately recognized that if they did not adhere to this policy, Parke, Davis would not sell to them and they desired to continue as customers of Parke, Davis. There is no evidence that any of them made any agreement with Parke, Davis as to sales to non-drug outlets, or that Parke, Davis ever solicited an agreemnet from any of them as to this matter.

31. There is no evidence that at any time during the period covered by the Government's proof Parke, Davis ever conferred or discussed its sales policies with more than one wholesaler or more than one retailer at a time, nor that it made the enforcement of its policies as to any one wholesaler or retailer dependent upon the action of any other wholesaler or retailer.

CONCLUSIONS OF LAW

1. The evidence as a whole does not support the allegations of paragraphs 13 through 16 of the Complaint.

2. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that on sales of pharmaceutical products manufactured by defendant Parke, Davis the wholesaler co-conspirators and retailer co-conspirators would adhere to resale prices fixed by defendant Parke, Davis.

3. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or

anyone else involving the District of Columbia or the State of Virginia to the effect that the defendant and the wholesaler co-conspirators would refuse to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who did not agree to adhere to resale prices fixed by defendant Parke, Davis.

4. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that the retailer co-conspirators would not advertise pharmaceutical products manufactured by defendant Parke, Davis at prices lower than the resale prices fixed by defendant Parke, Davis.

5. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that the defendant and the wholesaler co-conspirators would refuse to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who advertised such products at prices lower than the resale prices fixed by defendant Parke, Davis.

6. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone else involving the District of Columbia or the State of Virginia to the effect that the defendant would induce, coerce and compel wholesalers not to sell pharmaceutical products manufactured by defendant Parke, Davis to retailers who sold or advertised such products at prices lower than the resale prices fixed by defendant Parke, Davis.

7. Defendant Parke, Davis did not combine, conspire or enter into an agreement, understanding or concert of action with the alleged co-conspirators or anyone also involving the District of Columbia or the State of Virginia to the effect that defendant Parke, Davis and the wholesaler co-conspirators would sell pharmaceutical products manufactured by defendant Parke, Davis only to retailers licensed to fill or dispense prescriptions.

8. No violation of Section 1 of the Sherman Act has been shown.

9. No violation of Section 3 of the Sherman Act has been shown.

10. In view of defendant's changed practices and the other facts found by this Court in connection therewith, the awarding of injunctive relief would be neither necessary nor appropriate, even had the defendant, contrary to this Court's findings, been found to have engaged in unlawful price activities.

11. Plaintiff has shown no right to relief upon the facts and law, and defendant's timely motion for dismissal, under Rule 41 (b) is granted, and judgment in favor of the defendant shall be entered in accordance with these findings of fact and conclusions of law.

JOSEPH R. JACKSON,
*United States District Judge by Designation**

JULY 16, 1958

*A Senior Judge of the United States Court of Customs and Patent Appeals, sitting by designation pursuant to the provisions of § 294 (d) of Title 28, United States Code.

APPENDIX B

United States District Court for the District of Columbia

Civil Action No. 1064–57

UNITED STATES OF AMERICA, PLAINTIFF

v.

PARKE, DAVIS & COMPANY, DEFENDANT

ORDER

Defendant having moved under Rule 41 (b) of the Federal Rules of Civil Procedure to dismiss the Complaint at the conclusion of the Plaintiff's case, and the Court having considered the briefs of the parties, reviewed the transcript, heard oral argument, and having concluded that, upon the facts and the law, the Plaintiff has shown no right to relief,

IT IS ORDERED that judgment be entered for Defendant and that the Complaint be and is hereby dismissed in accordance with the Opinion and Findings of Fact and Conclusions of Law filed herewith.

/s/ JOSEPH R. JACKSON,
Joseph R. Jackson,
United States District Judge by Designation.

JULY 16, 1958